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No. 84-

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

EMORY WORTH BROWN, JR., Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Emory Worth Brown, Jr.
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Petitioner, Pro Se

VOLUME I

QUESTIONS PRESENTED

1. Whether the intent of the Congress in formulating the 18 U.S.C. 208 Conflict of Interest standards was to establish a de minimis guideline in Section 208(b) to preclude prosecutorial application to:

(a) acts in which the financial interest of the government official is "not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer;" and

(b) acts in which the financial interest is "too remote or too inconsequential to affect the integrity of Government officers' or employees' services;

in consonance with the direction accorded and exceptions to an offense noted in 18 U.S.C. 208(b)?

2. Whether there is a "substantial financial interest" as applied in the statutory provisions of 18 U.S.C. 208(a) sufficient to sustain a conviction for conflict of interest when no profit motive is involved and no profit is received in a minor transaction between a Naval officer and the Navy or any Government Officer and the Government in a procurement initiative designed to generate a substantial return on investment to the Government and for which such return is achieved and officially cited as having "contributed directly to the personnel stability upon which the overall combat readiness of the U.S Navy must depend."

3. Whether the determination of receipt of "anything of value for himself" as a required element for the

violation asserted in 18 U.S.C. 201(g) in defining acceptance of a gratuity is intended to include reimbursement of expenses for materials and resources employed in support of a Government project which produces economic benefits to the Government and for which no profit or financial gain accrued to the individual?

4. Whether the acceptance of reimbursement for out-of-pocket expenses by a Government officer in support of an official act is a per se violation of the statutory provisions of 18 U.S.C 201(g) against "accepting anything of value for himself" when the transaction does not involve personal profit or gain?

5. Whether there is a distinction between "payment for services with

beneficial gain to the individual" and "reimbursement for project related expenses when no beneficial gain accrues" in defining "receipt of a thing of value" as a violation of the statutory provisions against acceptance of a gratuity under 18 U.S.C. 201(g).

6. Whether a District Court charge to the jury explaining the gratuity statute under 18 U.S.C. 201(g) in response to a written question from the jury is improper where not supported by the evidence or where it incorrectly states the law as proscribing receipt of the alleged gratuity "as a result of" an official duty as opposed to the statutory provision "for, because of, or in exchange for" an official duty leading the jury to the only possible technical conclusion

that any type of contractual arrangement between a Government officer and an individual in which reimbursement is involved while performing an official act is a statutory violation?

7. Whether a conviction for an alleged violation of 18 U.S.C. 201(g), accepting a gratuity, can stand where there is absolutely no evidence that defendant performed any "official act for, because of, or in exchange for" any unlawful compensation?

8. Whether the Federal Courts of the United States, in violation of the due process requirements of the Constitution, are permitted to affirm a conviction based upon a fact situation that is clearly not true and not

supported by the record of the trial and by assigning to the defendant admissions of guilt that did not occur as to elements of the charges?

9. Whether the holding of the United States Court of Appeals for the Ninth Circuit that "when charged under 18 U.S.C. 201(c), a defendant is on notice that he must defend against the lesser-included offense defined in section 201(g)" as asserted in United States v. Raborn, 575 F.2d 988 (1978) is substantial and intended to permit the Government to employ such precedent so as to manipulate the adversarial process to obtain a conviction against an unknowing defendant and whether this is considered Justice in the spirit of the law?

10. Whether the conviction by a lay jury unfamiliar with military operations of an officer in the Armed Forces who explicitly conforms to the direction of his superior officers in performing a joint commercial-military operation can be upheld when a violation of those orders would result in serious contractual consequences for the Government and potential charges against the officer and when such direction would not be construed in a military proceeding as a statutory violation.

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No. 84-

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United States of America, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
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Petioner, Emory Worth Brown, Jr., petitions this Court for a writ of certiorari to review the Judgment and Decision of the United States Court of Appeals for the Fourth Circuit affirming the judgment of conviction against the Petitioner.

OPINIONS BELOW

The Opinion of Court of Appeals was entered on 2 August 1984 (A. 1a). Petitioner's Petition for Rehearing was denied on 21 September 1984 (A. 19a). No Opinion of the District Court ensued.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1) and Section 1291.

CONSTITUTION PROVISION INVOLVED

U. S. Constitution, Amendment V:

> Nor shall any person ... be deprived of life, liberty, or property, without due process of law ...

STATUTES INVOLVED

Title 18, United States Code:

> 201. Bribery of public officials
> (c) Whoever, being a public official ... directly or indirectly, corruptly asks, demands, exacts,

solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act;

...

Shall be fined not more than $20,000 ... or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

(g) Whoever, being a public official ... otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official acts performed or to be performed by him;

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

Title 18 United States Code:

208. Acts affecting a personal financial interest.

(a) Except as permitted by subsection (b) hereof, whoever, being an officer ... of the executive branch ... participates personally and substantially as a Government officer ... through decision, approval, ... rendering of advice, investigation, or

> otherwise in a judicial or other proceeding ... or other particular matter in which he ... has a financial interest -
>
> Shall be fined not more than $10,000, or imprisoned not more than two years, or both.
>
> (b) Subsection (a) hereof shall not apply (1) if the officer ... first advises the Government official responsible for appointment to his position of the nature and circumstances of the ... proceeding ... or other particular matter and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer ... or (2) if, by general rule or regulation published in the Federal Register, the financial interest has been exempted from the requirements of clause (1) hereof as being too remote or too inconsequential to affect the integrity of Government officers' or employees' services.

STATEMENT OF THE CASE

This case presents issues of first impression before this Court with respect to statutory provisions on accepting a

gratuity and conflict of interest under 18 U.S.C. 201(g) and 208(a).

Petitioner was convicted of one count of accepting a gratuity as a lesser included offense of 18 U.S.C. 201 and of three counts of conflict of interest under 18 U.S.C. 208. Of particular note is the substantial denial of Constitutional due process in this action which broadens standards applied to gratuity and conflict of interest to encompass reimbursement of expenses without personal gain as a gratuity and nonprofit transactions for which the Government gained extensive benefit as a conflict of interest.

Complexity of the case mandates detailed development of individual segments and focus on Navy objectives during the timeframe of the acts for which charges were ultimately filed.

Petitioner is a Naval officer tried in Federal Court rather than before a Navy tribunal because of civilian association in a joint Navy and private movie project. No civilian was ever charged in the case. After trial, a Navy Board of Inquiry convened to evaluate findings as to the officer. After three months of hearings, the Navy Board exonerated him of charges of accepting a gratuity and conflict of interest for which he had been convicted, in effect ratifying his actions. The Navy tribunal asserted that he:

> did not benefit personally from the sale of hatch cover tables, for which he was convicted of conflict of interest ... with regard to the conviction of accepting a gratuity, evidence supported the argument that money provided to (him) was in payment for expenses incurred in behalf of the squadron and the movie company ... the payment in no way constituted a gratuity.

The Navy Board asserted that the FBI and NIS reports, which "were the basis for

the Government's case," were:

> in the absence of other evidence, very damning of (him) but when considered with all the relevant facts in the case, the Board found these investigations filled with unsubstantiated allegations, many of which were based on rumor and innuendo rather than good objective evidence.

A

The Navy from 1978 to 1980 was undermanned and facing morale problems. Official Naval Operations objectives, which served as direction for the Petitioner as Commanding Officer of a fighter squadron, were set forth in a "Memorandum for all Flag Officers, Unit Commanders, Commanding Officers and Officers in Charge" dated 11 December 1979. Navy objectives applicable to the instant case are:

> ... Many objectives are carryovers. A common theme running through all is the need to run the Navy right, so we attract and retain talented officers and petty officers, and use our scarce resources to the best possible effect against an increasingly capable Soviet Navy. I have deliberately limited the

objectives to those which I consider warrant personal attention of the Navy's uniformed leadership:

CNO-1: Continue pressure toward resolution of the retention problem. ... our results are unacceptably below goals. Manning up the Navy must remain our highest order of priority. ... Keep the attention of the entire chain-of-command focused on the retention problem ... participate aggressively ... work aggressively.

CNO-4: Provide emphasis on people programs requiring special attention ... Continue to improve habitability for shipboard personnel ... Continue to pursue additional resources to fund our personnel support programs (such as morale ...).

CNO-7: Improve perceptions of the Navy ... objectives listed below are all important in their own right. At the same time they collaterally contribute to others' impression that the Navy knows where it is going, and is proceeding there in a sensible manner ... Keep improving the appearance of our people and installations ... Further improve base appearance to "look like the first class Navy that we are."

/s/ T. B. Heyward
Admiral, U.S. Navy
Chief-of-Naval-Operations

B

Petitioner was Commanding Officer of

VF-84, a fighter squadron embarked in USS NIMITZ and assigned when disembarked to Naval Air Station Oceana, Virginia. In 1978, he arranged with movie producer Peter Douglas and the Navy for a major feature length film developed around his Air Wing and the NIMITZ. The Navy eagerly accepted the proposal asserting that the movie would be of great benefit to Navy recruiting and retention objectives:

> VF-84 solicited Commander Naval Air Force, Atlantic Fleet involvement in the filming of the major motion picture "The Final Countdown" and dedicated extraordinary effort towards directing, coordinating and flying aerial scenes. This CNO Sponsored Project will be the most outstanding Navy Recruiting Instrument in recent times and will be seen worldwide. Squadron participation in the film is a major factor in retention and recruiting.
>
> (Atlantic Fleet Golden Anchor Award under signature of Commander-in-Chief, Atlantic Fleet)

As the project developed, Petitioner took responsibility for rewriting the script, coordinating aerial photography

and flying the F-14 photo plane. The aerials were filmed during a three week period in June 1979 at Key West.

The Navy and the production company agreed to a specified amount of F-14 time to be charged to the film at a rate of $4,000 per hour. An escrow fund was established to cover those flights, the flights of other support aircraft and administrative costs. The F-14 allocation was set at 30 hours by the Navy movie project officer and the Commander, Naval Air Forces, Atlantic Fleet.

Petitioner deployed one half of his squadron to Key West taking six airplanes from Oceana. In a dedicated effort to remain within budget constraints, he directed that his squadron pilots account for the specific flight time that was actually involved in the movie and separately for all other flight time that

would be justified as pilot combat readiness training. He timed the aerial scenes each night as the film from the previous day was reviewed. When difficulties with equipment, expertise and inexperience forced additional shooting, he sent an official Naval message to his commander requesting authority to extend the movie flight hour allocation from 30 to 35 with a 65 hour training extension. Authorization was granted by Naval message. He subsequently reported 32.5 flight hours dedicated to the movie.

Total flight time during the three week project was approximately 150 hours, including: cross-country flights between Oceana and Key West required for transit of fighters to and from the project site; exchange of aircraft daily between Oceana and Key West for maintenance and crew rotation; weather reconnaissance; combat

readiness training; and pilot proficiency. Flight time between Oceana and Key West one way was 2.4 hours. Had transit flights been chargeable to the production, the transfer of the six aircraft required for training and movie support to and from the site only one time would have totally displaced the 30 hour allocation with no time left for filming.

Petitioner was simultaneously tasked to prepare his squadron for imminent departure onboard USS NIMITZ in July for training and a nine month deployment to the Mediterranean and the Indian Ocean in September. As the movie was by necessity executed in addition to basic requirements of the squadron training plan, all pilots were exposed to training requirements concurrent with movie operations.

As coordinator for the aerial filming and as squadron Commander responsible for

the combat readiness and morale of his men and the public image of the Navy, Petitioner upgraded the appearance and habitability of his spaces onboard USS NIMITZ and at the Naval Air Station in accordance with CNO objectives. His actions in preparation for filming at both sites were, by arrangement with the producer, to be reimbursed at cost as was other direct project support. Petitioner expended his own funds in execution of this support and upon completion of filming and immediately prior to embarkation aboard NIMITZ, the producer presented to him a check for $5,563.48 to cover expenses. In return, Petitioner presented to the producer a form specifying materials similar to those were used in reconditioning squadron spaces to an amount estimated at the total cost outlays he had made for the project. The form was not a precise

representation of itemized support, but rather a hurried attempt to provide for the producer a rough file record to account for expenditures. The exchange occurred just before deployment and on the day the production company was winding up operations which by necessity accelerated the transaction beyond normal routine.

Subsequently, while enroute to Spain onboard NIMITZ, the Navy Cost Collector advised Petitioner that the producer had challenged certain administrative expenses and directed that he identify any expenditures associated with his squadron. Petitioner briefed his Air Wing Commander and the Captain of the NIMITZ and obtained permission to send a telegram to the producer advising him to honor his payment obligation. Petitioner asserted that the Navy had extended to the producer benefits of use of an aircraft

carrier at no cost and of fighters at the agreed allocation when charges could have been significantly expanded had dedicated accounting to separate training from movie support not been applied. Petitioner and the Captain of the NIMITZ were committed to the Navy to minimize potential for adverse publicity following a highly successful movie effort and in anticipation of a unique personnel recruiting film release. Both were concerned that the media would misinterpret movie charges and repeat previously run articles denouncing the use of cross country flying as official training flights. Petitioner sent the telegram via open Naval communications channels and the Western Union. Petitioner then responded to his direction from the Commander, Naval Air Forces, to itemize expenditures. Upon arrival in Spain, Petitioner called the Navy Cost Collector

to verify receipt of the correspondence and advised him of the telegram to the producer and of his expectation that logic would prevail and payment of obligations would follow.

Subsequently, the Government formed a theory on circumstantial evidence developed with respect to flight hours flown, receipt of the check and the telegram and charged the Petitioner with bribery under 18 U.S.C. 201(c). The Government contended that the petitioner undercharged the movie company for flight hours by not charging all flight time during the three week project; that the check from the producer to the Petitioner was exchanged for this action; and that the telegram was extortionary in support of the bribery allegation. The only references made to the telegram were those by the Petitioner to the Navy Cost Collector and to the FBI

agent. The telegram could not be recovered either by the Petitioner or the Government and was not produced at trial.

C

Petitioner had continuously engaged in self-help projects to upgrade squadron office and living spaces in support of Navy objectives to improve morale, public image, quality of life and habitability. His official Reports of Officer Fitness document his efforts and the physical reconditioning of 75 percent of spaces at Naval Air Station Oceana support the extensiveness of his personal involvement in the self-help program. In particular, he added nautical furnishings that he had personally constructed or purchased to the squadron spaces and to the office of the Navy Career Counselor. As a weekend hobby he made hatch cover tables mostly for use by Naval units as departure gifts for

their commanders. Over a five year period, he made 21 hatch cover tables, six of which were placed in his squadron.

In a special effort to create an environment to support the current recruiting theme, Petitioner used his hatch cover tables, nautical lamps and framed nautical prints in the squadron. Exceptional success of the effort was proven as his squadron won the Atlantic Fleet Golden Anchor Award for best personnel recruiting and retention program in the Fleet:

> This award attests to significant achievements obtained through command involvement, concern for individuals and recognition of the priority associated with retention efforts during FY 1979. By attracting and retaining quality personnel you have contributed directly to personnel stability upon which the overall combat readiness of the U.S. Navy must depend. ..
>
> The Career Counselor's office is designed to support the Navy theme of "It's not just a job, it's an adventure" through nautical decoration. This office is considered to be the most important facility in the

> command and has been given the highest priority in upgrade and rehabilitation of squadron office spaces. The office is spacious and is specifically laid out to provide privacy and an atmosphere of comfort in a nautical setting that belies the tight "steel grey ship compartation" characteristic of the thoughts of our enlisted personnel when they consider a future in the Navy. A permanently built wood paneled partition decorated with a large "WELCOME ABOARD" ship plaque flanked by brass ship's lanterns greets the career candidate as he enters the office. ... he passes by old recruiting posters framed in quality custom picture frames and enters a wood paneled family room environment with two comfortable leather chairs, hatch cover tables fashioned from hatches of old liberty ships, nautical lamps and artifacts and framed prints from the days of sail bracketed by candle sconces. The nautical decor creates an atmosphere that shows the pride associated with the early days of seamanship and instills in the career candidate a perspective on Navy life that tends to break down conventional barriers.

The Government charged the Petitioner with seven counts of conflict of interest for participating in the decision to purchase six hatch cover tables and one nautical lamp using Navy self-help funds.

Four counts were in association with a local merchant through whom tables had been sold to the Navy; but the jury acquitted on these counts based upon the merchant's assertion at trial that the payment received for the tables was applied in total toward payment of a separate Navy account receivable for the framed prints employed by Petitioner's squadron. Petitioner had in fact contributed the four tables to the Navy at his own financial detriment without reimbursement even for cost of materials.

Petitioner was convicted of three counts of conflict of interest for two hatch cover tables and one nautical lamp for which he contended he received only cost of materials and no profit. His conviction was affirmed on Appeal on the basis of the FBI assertion that Petitioner admitted he had made a profit, a statement

subsequently discredited under cross examination of the agent, by other trial testimony and by the Navy Board.

D

The Government brought charges on sixteen counts of theft of Government property and false statements; however, the Petitioner had properly and extensively accounted for the subject matter and the jury acquitted on all counts.

E

Investigation of the case had been initiated in July 1980, one year after completion of filming. Petitioner became aware of the investigation in November 1980 while on special assigment to Saudi Arabia and immediately upon his return to the United States initiated an interview with the FBI. He appeared without counsel. The FBI statement with respect to Petitioner's disclosures as to the case

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generated by this interview was unsigned and was subsequently and substantially refuted. Petitioner presented names of witnesses to corroborate his innocence to the investigating agent, including: the Captain of the NIMITZ; the squadron maintenance officer assigned to account for movie related resources; the squadron movie project officers most intimately familiar with flight hour accounting agreements; the Navy Public Works official under whose auspices Petitioner's space renovation projects had been developed over a ten year period; and the personnel who had specifically assisted in upgrading squadron spaces in support of the movie project. None were interviewed by the Government. Petitioner also requested a polygraph test to confirm his assertions of innocence, but the Government refused. During the next two years,

Government action on the case was essentially dormant.

In October 1982, the Government notified counsel for the petitioner of intent to pursue an indictment and entered into plea negotiations with counsel. Petitioner advised counsel that he would not accept plea arrangements and of his intent to present his case before the Grand Jury in an effort to preclude indictment. Petitioner expressed extensive concern that his father, who had been subjected to neurosurgery, would not survive the trauma of publicity accompanying an indictment. Petitioner also had, after two years of uncertainty during which his Naval career was in effect terminated and his financial resources depleted, reached a level of despondency so evident to counsel that he was advised to acquire psychiatric assistance to preclude imminent suicide. On the

eve of the Grand Jury appearance, counsel advised the Petitioner that: counsel could not be present before the Grand Jury; the conflict of interest statute was so worded that the prosecution could gain an indictment automatically; that there was no defense to conflict of interest charges; and that Petitioner would not be allowed to present his version of the events, but would only be allowed to respond to Government questions. Counsel then advised Petitioner that the Government had negotiated for a single count of conflict of interest, contrary to the direction given by the Petitioner against any plea agreement, and that a decision would have to be made in less than ten minutes. Counsel asserted that he was not allowed to recommend a course of action, but he left no option and his guidance was firm that this was the only way to preserve Petitioner's

father from exposure to adverse publicity that would surely attach. Under the pressure applied and the level of emotional stress that prevailed, Petitioner elected to terminate further damage. He accepted the Government proffer to enter a guilty plea to a single count of conflict of interest under 18 U.S.C. 208(a). Of note, counsel had never before defended in a criminal case.

Petitioner entered the plea in November 1982, but the Court did not accept, electing to take it under advisement. Petitioner then withdrew the plea in January 1983, asserting his innocence. The Government, on 20 January 1983, presented seventeen and seven count indictments in two separate actions and renewed the conflict of interest charge subject of the negotiated plea. That charge was then dropped at trial to avoid an unresolvable

conflict of a bribery charge on the same subject matter.

F

Petitioner was convicted of one count of accepting a gratuity under 18 U.S.C. 201(g), a lesser included offense of the bribery charge, and three counts of conflict of interest under 18 U.S.C 208(a) with judgment entered on 26 May 1983. On each of four counts, Petitioner was sentenced to pay a $5,000 fine and to serve one year in prison, incarceration suspended, and to serve three years of probation. Appeal was noted to the Fourth Circuit on 1 June 1983.

G

Subsequent to the District Court Trial, the Secretary of the Navy directed that a Board of Inquiry be convened as to the Petitioner based upon his Federal

convictions. The Navy Board convened on 22 August 1983 and conducted evidentiary hearings and deliberations until 7 November 1984. The Navy Board (A. 99a-113a) asserted in part:

> Commander Brown admitted that he received the check (the alleged gratuity) from the company which produced the movie 'The Final Countdown'. His position was that he did receive the check, but that he used it as reimbursement for his out-of-pocket expenses in the production of the movie and in the performance of his duties to improve and maintain his squadron spaces. ... The respondent stated that he never realized any personal gain or profit in any of the incidents and never intended to make such gain. His position was that his intentions were always to improve morale of his personnel and readiness of his command and to promote a good public image for the Navy through the movie. Commander Brown stated that he believed that under the Navy Judicial System he would not have been convicted because the true nature of his intentions and responsibilities as a Commanding Officer would have been understood. His position was that the Federal convictions were based on technical concepts of violation of the law which did not consider that he had unselfish motivations and made no personal gain. Commander Brown denied any improper

intent in any documents or statements which did not accurately reflect the nature of expenditures and reimbursement. He admitted inaccuracies, but denied dishonesty. Commander Brown's position was that he displayed the highest levels of good leadership in his unselfish and zealous devotion to the welfare of his subordinates, the combat readiness of the command and the broader goals of the Navy. The evidence presented to the board supported, in every instance, Commander Brown's version of the events.

The board acknowledges that Commander Brown engaged in questionable activities which were in violation of Navy directives. However, it is believed that Commander Brown is, basically, an honest man who always acted in the best interests of his subordinates and unit organizations. There is no evidence that Commander Brown profited monetarily by his actions. By using more orthodox procedures the same beneficial results might have been achieved but with much greater expenditure of time and, possibly, greater expense.

It is the opinion of the board that the Executive Officer of VF-84, when Commander Brown was Commanding Officer, and other officers senior to Commander Brown in the chain of command, did not follow a logical course of corrective action as provided by the guidelines of SECNAVINST 5370.2G, but rather pursued a course of action that ultimately allowed the matter of a

> lack of inventory custody cards and return of Navy property to the squadron to develop into a case that destroyed a front-running officer's career and has the potential for needless adverse publicity to the Navy.

H

The case was argued before the Fourth Circuit on 8 March and affirmed on 2 August 1984 (A. 1a-18a). A Petition for Rehearing (A. 21a-98a) noted on 17 August was denied on 21 September 1984 (A. 19a-20a). The Navy Board of Inquiry succeeded the trial and was not addressed in brief, nor presented before the Fourth Circuit although the subject was addressed during oral argument. The Navy Board heard 34 witnesses, including the NIMITZ Captain and Air Wing Commander, who were unavailable for trial due to Navy commitments, and 13 others who were at trial but not permitted to testify, and reviewed 87 affidavits among 167 evidentiary documents.

REASONS FOR GRANTING THE WRIT

1. The decision below has caused a split of authority in the circuits resulting in inconsistent precedent with respect to the guidelines of applying the lesser included offense of accepting a gratuity under 18 U.S.C. 201(g) when the original charge is that of bribery under 18 U.S.C. 201(c) and with respect to avoiding the judicial danger of fostering a compromise verdict by presenting both charges of bribery and gratuity to the jury contrary to the interest of justice and Constitutional due process.

The indictment involved two separate and distinctly opposed counts under 18 U.S.C. 201(c) and 208(a) on the subject matter for which the Petitioner was ultimately convicted of a lesser included offense of accepting a gratuity, a distinctly different third theory under 201(g). Count one charged bribery under 18 U.S.C. 201(c)(1):

> ... being an officer ... of the United States Department of the Navy ... corruptly did ... receive ... a thing

> of value, to wit: $5,563.48, in return for ... being influenced in the performance of an official act in respect to accounting for the number of flight hours which should be charged to ... a private movie maker engaged with ... Navy assistance in filming the movie "The Final Countdown."

Count seventeen charged the Petitioner with a violation of 18 U.S.C. 208(a) involving the same subject matter:

> ...being an officer ... of the United States Department of the Navy ... unlawfully did participate personally and substantially in the acquisition of business worth in excess of $5,000 for Binnacle Enterprises from the Aspen Production Company, a private movie-maker engaged with the United States Navy in the filming of "The Final Countdown," then knowing that he ... has financial interest in Binnacle Enterprises.

The Government dropped count seventeen to avoid the controverted theories and conceded in opening statement that the bribery theory was, at best, circumstantial requiring the jury "to draw a reasonable inference" of bribery. On testimony of seven witnesses (A. 26a-55a), including

the Commander, Naval Air Forces Atlantic Fleet (A. 49a-55a) that Petitioner was conforming explicitly to Navy direction to charge the movie company no more than the agreed upon 30 hour commitment and that Petitioner officially requested and received from his superior permission to charge for an additional 2.5 hours (A. 30a-33a), the jury in acquittal absolutely rejected the Government theory and found as a fact that there was no bribery.

Accordingly, inasmuch as the Government sought to prove a bribery case, and only resorted to a lesser included offense at the last moment to avoid certain defeat on the bribery charge, the Government failed to introduce proof into the record of threshold evidence necessary to support the gratuity charge.

Petitioner testified without dispute and with extensive witness support that he

received the check from the producer in reimbursement for monies paid out of his own pockets for improvement of Government spaces and for support resources in conjunction with the movie. He had been directed to "cooperate fully" with the production company and, in the absence of other guidance, he provided all assistance considered reasonable in his discretion as squadron Commanding Officer including support payments for the film for which reimbursement was anticipated and received. There was absolutely no evidence that the compensation was unlawful or paid for services rendered or other than reimbursement for expenses or that Petitioner realized a profit. On the contrary, the record contains undisputed evidence that Petitioner used his own funds to pay for construction of permanent fixtures that remain today in Government spaces (A. 63a-83a).

In United States v. Harary, 457 F.2d 471, 477, the D. C. Circuit held that:

> If the court can conclude on the basis of the evidence presented that no reasonable man, weighing solely the evidence in light of the applicable law, could find the defendant guilty of the lesser offense and at the same time not guilty of the greater offense, no disputed factual element could be present which would compel the court to give the lesser included offense instruction. Accord United States v. Brewster, 506 F.2d 62, 72-73, n. 26.

A fortiori, where the record is such, as in the instant case, that a finding of not guilty by the jury as to the greater offense of bribery leaves the record uncontradicted as to the absence of any remaining evidence to support the finding of the lesser included offense of gratuity, then Petitioner's conviction for accepting a gratuity cannot stand on such record. The Court in Harary reversed the conviction, inter alia, asserting that the District Court should never have submitted

to the jury both the bribery and gratuity offenses, but only the bribery offense on that record. Harary, at 480.

The Court in Brewster, stated:

> ... proof on the element or elements differentiating the two crimes (bribery and gratuity) must be sufficiently in dispute so that the jury may consistently find the defendant innocent of the greater and guilty of the lesser included offense." 506 F.2d 62 at 73-74, n. 26.

The Court denied the motion for Judgment of Acquittal as to bribery and submitted both bribery and gratuity charges to the jury. While the jury was deliberating, the panel requested clarification in writing regarding gratuity:

> "Could the Court define the essential elements contained in the charge under count 1 in the lesser charge of accepting a gratuity?"

The Court reviewed the first two elements as though they were conclusively presumptive and then the third element:

... The Government would have to prove

> beyond reasonable doubt that the defendant was given money as a result of the performance of an official act. Said another way, that he performed a duty as a Naval officer as required by the Navy for him to do, and that as a result of doing that which he was required to do, he was given the money and he accepted it. Now remember that the Government has the burden of proving by a preponderance of the evidence -- by evidence which would establish beyond reasonable doubt that element as well as the other two elements of that crime; that is, that the defendant was given the money as a result of the performance of an official duty that he was required to do or required to perform as a Navy officer or that he had been ordered to perform as a Navy officer and that he accepted the money. (emphasis added).

Petitioner objected to the charge and the Court agreed that the original charge as to the lesser included offense of gratuity was "a little convoluted", but refused to recharge the jury. Petitioner submits that the original and supplemental charges given the jury were not correct statements of the applicable law and failed to adequately distinguish between

bribery and gratuity. Further, a reading of the charge clearly leaves no option for lawful receipt of reimbursement of expenses or of any transaction between the Petitioner and the movie company even with no profit or personal gain. The interpretation given by the court to the check as "something of value" and dismissed as a conclusive presumption of fact left no room for the jury to consider that "something of value" requires personal gain. If there is no personal gain, as in cost reimbursement in which only the Government gained, the individual could not, by any definition, have received something of value for himself. The Court did not use the term "reimbursement" or acknowledge potential for reimbursement as being outside of statutory provisions for violation or distinguish between "reimbursement of expenses" and "payment for services."

The Brewster Court asserted that the bribery and gratuity statute is not cited "as a model of clarity and nicely drawn distinctions." 506 F.2d 62 at 78. Specifically, the Court wrote as if it had the very case at bar in mind:

> Where the statute does not cause great difficulty for a trial judge, a difficulty which we hold proved fatal to the conviction in this case, is that in addition to the problem of drawing a distinction between one definable offense and innocent conduct, where both offenses are charged, a trial judge must also draw the tripartite distinction between conduct within the defined intent to constitute an offense under the bribery section (c), conduct with the requisite intent to constitute an offense under the gratuity section (g), and conduct with an intent which constitutes no offense at all. The Trial Judge strove manfully -- and judicially -- to make these fine distinctions for the jury. Yet we have found it difficult ourselves, with adequate time to reflect and ponder, to understand the subtle distinctions made in the written text of the instructions. With the advantages of time, a written text, and a modicum of legal learning, we are doubtful if we comprehend fully the Trial Court's explanation of the subtle distinction between guilty under one section,

> guilt under the other, and total innocence. We are certain the jury could not possibly have discerned the boundary lines on the basis of these instructions, and this a jury must be able to do in order to convict a defendant on any charge. Id. at 78.

The Brewster Court found reversible error in the charge of the District Court even where the charge was as per the statutory language, which language exceeds in clarity and correctness the vague and confusing language of the instant Court.

Furthermore, the Brewster Court admonished District Courts and prosecutors in such bribery and gratuity cases to carefully avoid the unique pitfalls presented by such bifurcated charges and their invitation to juries to compromise:

> A note of caution to the prosecution: In future cases before the prosecution asks for charges to the jury under both the bribery section (c) and the gratuity section (g), it should be satisfied that the charge proposed is designed to avoid the pitfalls we have found here. The prosecution might elect the safer

> course of only going to the jury under either the bribery section (c) or gratuity section (g), but not both.
>
> The danger inherent in the situation calling for the trial judge to distinguish sharply among guilt under the bribery section, guilt under the gratuity section, and innocence under either or both, is that the jury is subconsciously tempted to compromise. If the line between the greater and lesser offense is muddy, if the distinction between knowingly accepting an illegal gratuity and cheerfully acknowledging a legitimate campaign donation is dim, then why should not the jury take the "middle ground", i.e., find the defendant guilty of the offense carrying the lesser penalty? This may have happened here. A defendant is entitled to more than a possible jury room compromise, he is entitled to have his guilt or innocence voted up or down on the clearest possible lines of distinction. Id. at 83.

The case at bar is a classic example of a compromise sought and a compromise gained as the Government charged the defendant with seventeen major counts of moral turpitude and "tacked on" seven conflict of interest technical violations subsequent to a plea offer to a single

count of conflict of interest. Of particular note should be the difference in exposure between the initial charge of $10,000 fine and two years imprisonment and the trial charges of $250,000 and 136 Years imprisonment. The Government had no case from the outset or the plea negotiations would have been more demanding. The Government presented no valid evidence to support the major violations and with extensive witness assertions that Petitioner had directed explicit accountability for the items in question; that the Commander, Naval Air Forces had been provided a detailed inventory by the Petitioner; and that all items were properly destined for Government use, the jury rejected all allegations of moral turpitude conduct. In each indictment, the jury elected to convict only on the least substantial offense in a classic representation of jury

compromise - "Where there is so much smoke, there must be some fire."

The Government proffered two opposite theories with respect to the same subject matter, bribery and conflict of interest, and then submitted, in the last instant, a third theory to salvage a conviction by a compromise verdict. And the Government relied upon United States v. Raborn, 575 F.2d 688 (9th cir. 1978), as precedent allowing injection of the lesser included offense theory without presentation of a defense against the charge. Note the trial record (Tr. 1048-1049) from the fourth day of proceedings while Defendant was under cross-examination:

> Q: Okay. Now, when you took the five-thousand dollar check from Peter Douglas, did you consider that to be a gratuity?
>
> A: Not in the slightest. It was reimbursement to me for out-of-pocket expenses.

Q: What is a gratuity? Do you know what a gratuity is?

A: Yes, I know what a gratuity is.

Q: Would you tell us what --

MR. STANLEY SACKS: If Your Honor please, I object to that. He's not charged with accepting a gratuity. he's charged with taking a bribe for -- in exchange for a promise that he would reduce flight hours illegally and improperly. He's not on trial for a gratuity. There's no statute that makes it a criminal offense for him to take a gratuity.

THE COURT: He's on cross examination.

MR. STANLEY SACKS: I understand, Your Honor, but that can be misleading. He's not charged with that.

THE COURT: I think it's within proper bounds.

There was no indication by the Court or the Government that a gratuity charge was forthcoming or that it was a statutory violation or that Defendant should be on notice to defend against a gratuity charge. While it may not be incumbent upon the Court to provide notice, justice

is better served when the adversarial encounter does not prejudicially favor the judicial power. Victory is pyrrhic when gained at the cost of justice and empty when achieved against no opposition. The Court was not reasonably responsive to the objection or to the issue.

The Fourth Circuit dismissed the issue as to the jury charge and the potential for a compromise without addressing the salient point:

> Viewed in total context of the original instruction and the form of the jury's request, and taking into account the discretion reposed in the trial court, this supplemental instruction cannot be found prejudicial. (A. 15a)

Petitioner respectfully submits that the prejudicial effect of the erroneous supplemental charge cannot be dismissed as within the "discretion reposed in the Trial Court" and is actually heightened by the fact that the jury expressed explicit

difficulty with this element of the gratuity charge and asked for clarification. Where that clarification is an incorrect statement of the law and is not representative of the precise language of the statute, the Government cannot claim the Defendant was accorded a fair trial.

Petitioner respectfully submits that the Fourth Circuit was confused by the gratuity issue as indicated by the holding (A. 14a) that there was:

> ...substantial evidence to support the inference that Brown did in fact receive the check "for or because of" either <u>understating the number of hours for which the producer would be charged</u> or gratuitously remaining silent when disclosure of this fact was required by Naval regulations, either of these being "official acts" within the meaning of the statute.

Either of these "official acts" as defined would have constituted bribery and both were not in consonance with testimony presented by the Commander, Naval Air

Forces Atlantic Fleet, and the Navy Cost Collector who confirmed that flight hours were not undercharged (A. 26a-55a). No evidence appears to support an undercharge of flight hours other than circumstantial interpretation by the FBI agent. There was no assertion that Defendant "remained silent" or that "disclosure of this fact was required by Naval regulations." On the contrary, Defendant advised the Navy Cost Collector by Naval message of flight hour charges and obtained authorization.

Petitioner respectfully submits that the sharply different precedent now established between the Ninth and Fourth Circuits convolutes the law further than the previously acknowledged difficulties in interpretation and application of the statutes. In the interest of Justice and proper administration of the law, the Court should take the compromise verdict

potential and the misapplication and misinterpretation of the law as presented in the statutory provisions of 18 U.S.C. 201 under review. The Court should grant certiorari in order to clarify a statute of central importance to the judicial system and to afford the defendant his Constitutional rights to a fair trial.

2. Precedent has been generated by the case in point that broadens the application of 18 U.S.C 208(a), the statute on conflict of interest, to encompass virtually any transaction between a Government officer in which the officer is personally involved, even when there is no personal profit and the Government realizes a significant economic gain.

In formulating the 18 U.S.C. 208 Conflict of Interest standards, the Congress added section 208(b) to provide guidelines as to exemptions from the Act. The statutory language is most significant:

> (b) Subsection (a) hereof shall not apply if ... the interest is not so substantial as to be deemed likely to

> affect the integrity of the services which the Government may expect from such officer ..., or (2) if ... the financial interest has been exempted from the requirements of clause (1) hereof as being too remote or too inconsequential to affect integrity of Government officers' services.

Petitioner respectfully submits that the intent of the Congress was to provide de minimis connotation to the statute so that a Government prosecutor would consider diligently the status of the financial interest involved in a transaction of concern and employ sound prosecutorial discretion to reject an interest that is remote, inconsequential or insubstantial.

Congressional intent is clearly to prohibit financial arrangements between the Government and agents which reasonably can be expected to impact upon the objectivity of honest and fair Government. The Congress intended to exempt in the letter

and spirit of the statute insubstantial or insignificant financial interests:

> Although 208(a) prohibits a Government employee from participating substantially in a matter in which he has any 'financial interest', 208(b) makes clear that insubstantial interests are to be exempted ... Assuming that Congress intended to treat consistently affiliations with a similar potential for influencing an employee's integrity and impartiality, the prohibitions in 208(a) related to employment should not be interpreted to reach insubstantial contacts or connections ... United States v. Conlon, 481 F. Supp. 654, 667 (E.D.C. 1979).

Grassetti v. Weinberger, 408 F. Supp. 142 (N.D.C. 1976) suggests that no conflict of interest existed within the meaning of 18 U.S.C. 208 where the defendants would not have benefitted financially or where the possibility of conflict of interest was too remote.

Commentators expert on 18 U.S.C. 208 have concluded that Congressional intent was not to proscribe insubstantial, insignificant or remote financial interest:

> It is unfortunate that the new Act did not include the word "substantial" immediately preceding "financial interest" in section 208. In the absence of such a statutory term, essentially the same result can and should be reached within the framework of the exemptive provisions. The most important provision is that the interest be a substantial one - meaning that the circumstances of personal interest should raise the possibility that a reasonable man (not necessarily the particular official) would in fact be affected in his official judgment. Perkins, The New Federal Conflict-of-Interest Law, 76 Harv. L. Rev. 1113, 1135 (1963).

The facts that Petitioner's connection with hatch cover tables was a hobby interest, done almost completely on weekends; that involved the making of only 21 tables over a five year period, only a few of which were sold; that Petitioner did not profit from the sales and had absolutely no financial interest in the results of any of these sales; that he never personally gained from any transactions alleged in the counts of which he

was convicted; that the transactions involved were for a cost that was one-fourth of the fair market value of a hatch cover table; and that a knowledgeable witness testified that the tables could not even be produced commercially for the cost asserted, established beyond dispute that Petitioner's conduct did not fall within criminal prohibitions of 18 U.S.C. 208.

Petitioner respectfully submits that the Congress could never have intended that an individual may, with larcenous intent, steal without excuse or justification goods in the amount of $199.00 or less on a Federal reservation and be guilty of a mere misdemeanor, while a Naval Commander could procure for his fighter squadron at prices well below market value and without profit two hatch cover tables built as a weekend hobby and a nautical lamp purchased commercially and

be termed guilty of three felonies.

Petitioner employed his resources and woodworking skills to enhance quality of life of his squadron in direct accord with Chief of Naval Operations objectives. He was reimbursed for costs incurred on three of seven pieces placed in his squadron and gave the remainder gratis to the Navy.

The Fourth Circuit affirmed the convictions asserting that he had conceded making a profit based on the testimony of an FBI agent, which was circumstantial and which was the only evidence of an alleged profit presented at trial:

> Q: And he told you that he made no profit from them, didn't he?
>
> A: At first he told me that.
>
> Q: All right, sir.
>
> A: Then he told me he did make a profit.
>
> Q: Well, the reason he told you, as you say, that he made a profit is that -- well, who pointed out to

him that materials would not count for the purchase price? Who told him -- Well, "If you say you didn't make a profit, your giving materials doesn't count," who told him that.

A: I told him that.

Q: I direct your attention to page -- well, it's page 12 of your notes --

A: Uh-huh.

Q: -- at the top of the page. Your notes are: "Commander Brown indicated he got no profit from the sale of these tables, but when it was pointed out that ma-terials would not count for the purchase price, he indicated that he possibly made a profit on some of the tables." Is that what happened? (emphasis added).

A: That's correct.

This manipulation of facts and semantics to create the illusion of a profit does not comport to a concession as to making a profit.

A transaction void of a personal financial gain or a profit or a benefit to the individual is not a "substantial

interest" as presented in 18 U.S.C 208.

The statutory language of 208(b) specifically addresses the substantiality of the financial interest as to affect on "the integrity of the services which the Government may expect from such officer." Petitioner respectfully submits that the Official Reports of Officer Fitness appended (A. 120a-153a) attest to the fact the integrity of the services by the Government officer in this case has been conclusively proven to be outside of that intended as in violation of the statute and that a closer review of a candidate for prosecution is mandatory to preclude a judicial indiscretion that could remove the highly valued services of an officer from the Government without cause.

The policy in creating and applying the statute should be clear:

The policy objectives which underlie

> conflict of interest laws include the assurance of impartiality, fairness, and equality of treatment toward those dealing with the Government, the elimination of private considerations in public decisions, the efficient and economical operation of Government, the maintenance of public confidence in Government, and the prevention of the use of public office for private gain. Perkins, The New Federal Conflict-of-Interest Laws, 76 Harv. L. Rev. 1113, 1118.

Petitioner respectfully submits that the policy objectives presented and the holding in United States v. Evans, 572 F.2d 455, 480 (5th cir.) that the purpose of conflict of interest laws is to eliminate clouded judgment by Government officers, preferential treatment, inefficient management and the temptation to act contrary to the best interests of the Government are precisely on point and that guidelines as to application of the law should be defined to preclude prosecution of a Government officer whose actions are clearly favorable to the Government, are

cited as improving efficiency and as exceptionally meritorious resource management and are of no personal gain.

The Petitioner respectfully submits that review of the statutory provisions of 18 U.S.C. 208 is both necessary and timely. Certiorari should be granted to provide guidelines to the essentially unused conflict of interest provisions to prevent misapplication, to foster proper use of the statute and to enable the Courts to execute the intent of the Congress to maintain objectivity in honest and fair Government.

3. The decision below affects the relationships between all government employees and the commercial sector such that efficiency and initiatives to enhance economic benefits to the Government will be suppressed out of fear to take any innovative action lest the individual be charged and convicted of the slightest technical violation of the statutory provisions of 18 U.S.C. 201(g) and 18 U.S.C. 208(a) as interpreted by a prosecutor and at his discretion.

The instant case demonstrates clearly the absolute de minimis transactions for which charges can now be brought in Federal Court and the far reaches to which the Government will extend in adversarial practice in order to secure a conviction under the statutory provisions of 18 U.S.C. 201(g) and 18 U.S.C 208(a).

The statutes are unfamiliar in public use and are virtually untried. In the instant case, they have been applied to obtain convictions based on a scintilla of circumstantial evidence when opposed by overwhelming evidence of innocence. A conviction for accepting a gratuity has been applied to a Naval officer who followed orders explicitly and conformed to every requirement placed upon him to meet contractual obligations and who received no beneficial gain out of the transaction. A conviction for conflict of

interest has been applied to an officer who bestowed benefit upon the Government in a transaction for which he received no profit and had no financial interest.

Petitioner would urge the Court to note that operational military commanders and Government officers are called upon in the field of combat and the decision arena of Government to make the best use of scarce resources, to employ their best skills in meeting the demands placed upon them by the Nation, and to produce with maximum efficiency and effectiveness in an environment that demands innovation. The decisions rendered in the instant case as to interpretation of the law will have far-reaching consequences as those officers who must react with immediacy may not for fear of possible technical violation of a statute although logic would suggest that their actions are proper.

Certiorari should be granted to establish precedent for operations of Government decision officers to ensure that unwarranted barriers to exercise of judicious, prudent and logical courses of action are not erected by fear of prosecution at the discretion of a Government attorney through use of a statute that could essentially be applied *per se* to virtually any Government transaction.

4. Contrary to the Constitutional provision asserted in the Fifth Amendment providing for due process of law, the Fourth Circuit affirmed convictions for acceptance of a gratuity and for conflict of interest based on erroneous assertions that the Defendant had conceded the elements of guilt, profited on transactions with the Government and had undercharged a motion picture company for flight hours flown violating Navy directives when the trial record is absolutely void of substantiation and presents undisputed and overwhelming evidence to the contrary.

Petitioner respectfully submits that any precedent of law established as to the difficult and controversial application of

the statutory provisions of such potentially far reaching and dangerous concepts as the gratuity and conflict of interest issues under 18 U.S.C. 201 and 18 U.S.C 208 should not be based upon a case that is frought with error, misinterpretation and due process violation. The Petition for Rehearing has been appended and annotated with insertion of applicable excerpts from the record of trial to demonstrate in detail the substantial error involved. Brief analysis of one issue is presented here to provide a basis for granting certiorari.

The Opinion of the Fourth Circuit (A. 1a-18a) asserted that:

> Ultimately, Brown submitted flight hour records indicating that his squadron had flown 32.5 hours. According to the testimony of Agent O'Brien, however, Brown admitted that he <u>should</u> have charged Douglas for 150 hours of flight time, so that his understatment of hours slighted the Navy and benefitted the producer in an

> amount on the order of $435,000. Furthermore, the evidence showed that in July 1979, when the producer and the Navy were engaged in a dispute concerning payment of certain administrative expenses, Brown telegraphed Douglas urging him to pay promptly, since failure to do so might lead to a Naval inquest that might in turn disclose that flight hours had been underbilled.
>
> On this evidence, Brown was convicted under the bribery count, of the lesser included offense of illegally accepting a gratuity in violation of 18 U.S.C. 201(g). (A. 6A).

As presented in the Petition for Rehearing (A. 26a-84a), Petitioner never conceded that he "should have charged Douglas for 150 hours of flight time." On the contrary, direct orders from the Commander, Naval Air Forces, as asserted in his testimony, precluded the Petitioner from charging in excess of the amount of flight time agreed upon between the Navy and the producer, that being 30 hours. The testimony asserted that the separation of charges for training and direct movie

support were in consonance with his guidance.

The statement of Agent O'Brien was that "...he indicated that he -- he could have charged Mr. Douglas for at least a hundred and fifty hours", which was in fact a true statement, only cut short of explaining that official direction was to the contrary and that such charges were improper. The Petitioner further advised the agent that he was not authorized to charge additional hours, that such a charge would have been inappropriate as most of the flight time was training and cross country transit time routinely required for pilot proficiency, and that he had charged the movie company for those hours specifically dedicated to the movie and the remainder properly to training, in accordance with his Navy direction and the contractual obligations between the Navy

and the production company. His statements were conclusively supported in the trial testimony as presented in the Petition for Rehearing (A. 21a-84a) and by the "Navy inquest" (A. 99a-113a) referred to in speculation by the Fourth Circuit. As to the telegram, the Fourth Circuit adjusted the date by two months to fit it into the timeframe necessary to support the circumstantial evidence speculated as to the reasons for its transmission. The telegram was not sent in consonance with delivery of the check, but in response to a cost account-ing for administrative expenses. The Captain of the NIMITZ subsequently testified before the Navy inquest that he had discussed the telegram with the Petitioner and corroborated his testimony in opposition to the testimony of the FBI agent. Of particular note, the Navy inquest asserted (A. 106a-107a) that:

> The NIS and FBI investigations were the basis for the Government's case against Commander Brown. The board found these two exhibits, in the absence of other evidence, were very damning of (him). However, when considered with all relevant facts in the case, the board found these investigations filled with unsubstantiated allegations, many of which were based on rumor and innuendo rather than on good objective evidence.

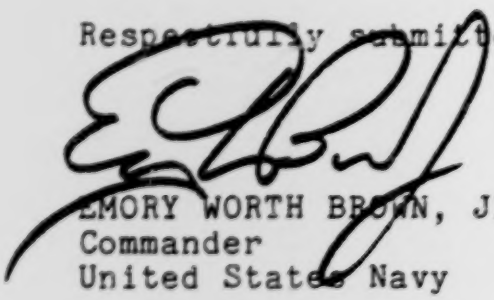
Of note, the movie producer was never charged with giving a gratuity which is of some concern if he did indeed benefit illegally to the extent of "$435,000" as asserted by the Fourth Circuit.

Petitioner respectfully submits that the precedent established by this case is based on a decision absent justification and that the Court should grant certiorari to ensure that Constitutional due process rights are upheld, that the law upon which future decisions to prosecute and upon which convictions removing the civil rights of individuals will be based should not be tainted.

CONCLUSION

In view of the inconsistencies between the opinions of the Circuits as well as the serious questions and far reaching consequences presented, Petitioner urges that this Court should grant a writ of certiorari.

Respectfully submitted,



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